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Analysis of a Postal Employee's Right to Refuse Hazardous Work during the Anthrax Crisis of 2001

John B. Flood*

I. Introduction

He made the 911 call at 4:39 a.m. on Sunday, October 21, 2001.¹ The caller, Thomas Morris Jr., a postal employee who worked at the Brentwood Mail Processing and Distribution Center (Brentwood) in Washington D.C., was dying from inhalational anthrax which he was exposed to while at work. He believed he had been exposed one week earlier, when a co-worker in his vicinity reportedly found an envelope with a powdery substance in it.² A portion of the 911 phone call went as follows:

OPERATOR: "Hello"

MORRIS: "Yes, um, my name is Thomas L. Morris Jr., I'm at 4244 Suitland Road in the (inaudible) apartment complex, apartment 201."

OPERATOR: "And what's the problem?"

MORRIS: "My breathing is very, very labored."

OPERATOR: "How old are you?"

MORRIS: "Um, 55."

MORRIS: "Ah, I, I don't know if I have been, but I suspect that I might have been exposed to anthrax."

OPERATOR: "Do you know when?"

MORRIS: "It was last, what, last Saturday a week ago, last Saturday morning at work. I work for the Postal Service. I've been to the doctor. Ah, I went to the doctor Thursday, he took a culture, but he never got back to me with the results. I guess there was some hang-up over the weekend, I'm not sure. But in the meantime, I went through a achiness and head achiness, this started Tuesday. Now I'm having difficulty breathing and just to move any distance, I feel like I'm going to pass out. I'm here at the house, my wife is here, I'm on the couch."

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¹ ASSOCIATED PRESS, *I Feel Like I Might Just Pass Out*, WASH. POST, November 8, 2001, at A10.

² *Id.*

....

OPERATOR: "Ok, which post office do you work at?"

MORRIS: This is the post office downtown, um, Brentwood Road, Washington D.C., post office. (Pause) There was, ah, a woman found an envelope, and I was in the vicinity. It had powder in it. They never let us know whether the thing had anthrax or not. They never, ah, treated the people who were around this particular individual and the supervisor who handled the envelope. Ah, so I don't know if it is or not. I'm just, I haven't been able to find out, I've been calling. But the symptoms that I've had are what was described to me in a letter they put out, almost to a tee. Except that I haven't had any vomiting, except just until a few minutes ago. I'm not bleeding, and I don't have diarrhea. The doctor thought that it was just a virus or something, so we went with that and I was taking Tylenol for the achiness. Except the shortness of breath now, I don't know, that's consistent with the, with anthrax.

OPERATOR: Ok, you weren't the one that handled the envelope, it was somebody else?

MORRIS: No, I didn't handle it, but I was in the vicinity.

OPERATOR: Ok, and do you know what they did with the envelope?

MORRIS: I don't know anything. I don't know anything. I couldn't even find out if the stuff was or wasn't. I was told that it wasn't, but I have a tendency not to believe these people. But anyway, ah, the woman who found it, her name was Helen, she could probably tell you more about it, then I could. And the supervisor who was involved, her name is Shirley (unknown).³

The call ended at 4:50 a.m. Mr. Morris died just a few hours later at a local hospital.

The tragic death of Mr. Morris, a 28 year veteran of the postal service, from anthrax was but one instance of a much larger problem.⁴ The anthrax crisis reaffirmed, after the horrific events of September 11, 2001, that America's workers may be the targets of terrorist acts at work and that they are vulnerable to such attacks, despite the protective efforts of employers, government officials, and experts from the scientific and medical communities.⁵ Should employees' vulnerability to attack simply be dismissed as an inevitable consequence of the age in which we live?

³ *Id.*

⁴ UNITED STATES POSTAL SERVICE, *Fact Sheet, 11 a.m.* (October 24, 2001), at <http://www.apwu.org/departments/ir/s&h/anthrax/USPS%20Fact%20Sheets/USPS%20Fact%20Sheet%20Oct.%2024.%202001%2011am.PDF> (last visited web site July 11, 2002).

⁵ USPS' officials declined to speak with the author or to otherwise provide requested information to him regarding the anthrax crisis. E-mail from Karen McAliley, Executive Assistant to Susan F. Medvidovich, Senior Vice President Human Resources (June 5, 2002, 6/5/2002 19:06 EST) (on file with author).

The answer to that question is resoundingly no, especially when it is considered within the context of Mr. Morris' infection and death from inhalational anthrax. Part two of this paper addresses the postal service, anthrax crisis of 2001 up to the point that Mr. Morris died on October 21, 2001. Part three considers what protections he would have held if he had chosen not to go to work at various times in relation to his encounter with a letter that he believed may have contained anthrax. The resulting answers will show that workers in America are not adequately, legally protected against the threat of such attacks, and that their right to refuse hazardous work in the face of terrorist attacks in the workplace must be expanded, as recommended in part four, as one means of better protecting them.

II. Anthrax and the Mail – 2001

“By its very nature bio-terrorism gives no warning. It creates fear. Fear, that if not dealt with in an honest, forthright manner - with information - can cripple an organization or a nation.” John E. Potter, Postmaster General, October 30, 2001.⁶

Anthrax (*B anthracis*) is one of the most feared and potentially lethal biological weapons that a terrorist might use.⁷ The use of anthrax as a weapon in the United States in 2001 caused twenty-two confirmed or suspected cases of anthrax infection.⁸ People can be infected by touching it (cutaneous anthrax), breathing it (inhalational anthrax), or by ingesting it (gastrointestinal anthrax).⁹ Inhalational anthrax is much more deadly than is cutaneous anthrax, particularly if left untreated, and it is estimated that inhalational anthrax would account for the largest number of deaths should anthrax be released in an

⁶ *Oversight of the U.S. Postal Service: Ensuring the Safety of Postal Employees and the U.S. Mail, Before the House Comm. on Government Reform, 107th Cong. (October 30, 2001) [hereinafter House Oversight Hearings]* (statement of John E. Potter, postmaster general/ceo, United States Postal Service) [hereinafter Potter Statement], (on file with the U.S. House Committee on Government Reform and with author).

⁷ THE WORKING GROUP ON CIVILIAN BIODEFENSE, *Anthrax as a Biological Weapon, 2002, Updated Recommendations for Management*, JAMA, VOL. 287 NO. 17, May 1, 2002, 2.

⁸ *Id.*

⁹ *Id.* at 5.

aerosolized form as a biological weapon in the future.¹⁰ Of the twenty-two confirmed or suspected cases in 2001, five people died from inhalational anthrax while six others were infected but survived, and the remaining eleven cases were cutaneous (either confirmed or suspected) from which no one died.¹¹ There were no reported cases of gastrointestinal anthrax infection in 2001 in the United States.¹²

Prior to the crisis of 2001, there were few cases of inhalational anthrax infection in the United States and abroad. Between 1976 and 2001, there were no reported cases of inhalational anthrax in the United States, and between 1900 and 1976, there were only eighteen such reported cases, which were primarily related to workers in textile mills who worked with goat hair, goat skins, and wool.¹³ The only known epidemic of inhalational anthrax occurred in 1979 in Russia after anthrax spores were accidentally released from a Soviet bioweapons factory.¹⁴ Additionally, anthrax infection in humans can occur naturally as the result of contact with animals or animal products that are infected with the disease, and the cutaneous anthrax is the most common form of infection from naturally occurring anthrax.¹⁵ In the United States, one case of cutaneous anthrax was reported in 2000, while 224 cases were reported between 1944 and 1994.¹⁶

There were several instances in the United States where a powdery substance, allegedly containing anthrax, was sent through the mail system in an envelope or package,

¹⁰ *Id.* at 2-5.

¹¹ *Id.* at 2.

¹² *Id.* at 10.

¹³ *Id.* at 2, 5; CENT. FOR DIS. CONTROL, *Bioterrorism Alleging Use of Anthrax and Interim Guidelines for Management – United States, 1998*, MORBIDITY AND MORTALITY WEEKLY REPORT, VOL. 48, NO. 4 (February 5, 1999); J.A. JERNIGAN ET AL., *Bioterrorism-Related Inhalational Anthrax – The First 10 Cases Reported in the United States*, EMERGING INFECTIOUS DISEASES, VOL. 7, NO. 6, 933, 941 (NOV – DEC 2001).

¹⁴ THE WORKING GROUP ON CIVILIAN BIODEFENSE, *supra* note 7, at 2, 8 (noting that mortality reports for those with inhalational anthrax from this incident range from 68 deaths of 79 total patients, to 100 deaths of 250 total patients).

¹⁵ *Id.* at 5.

¹⁶ *Id.*

before 2001.¹⁷ All of these cases turned out to be “hoaxes,” yet they prompted the United States Postal Service (USPS) to create a policy to deal with such incidents in 1999.¹⁸ The USPS policy, entitled “Emergency Response to Mail Allegedly Containing Anthrax,” stated in part, “Hoaxes can leave employee and the community in need of information and counseling, and the possibility of bioterrorism cannot be ignored... It is management’s responsibility to minimize potential exposures through quick isolation and evacuation until emergency response and law enforcement can arrive and take control of the incident.”¹⁹

Despite the foresight of that policy, postal officials did not know that anthrax spores could escape from a sealed envelope during the critical days of the anthrax crisis.²⁰ They did not know this because throughout the ordeal, they relied on the advice of officials from the Centers for Disease Control (CDC), who also did not know that anthrax spores could come out of a sealed envelope during mail processing. According to Dr. Jeffrey Koplan, then Director of the Centers for Disease Control, they did not realize that postal employees could be at risk from the anthrax found in a highly contaminated letter that was opened in Senator Tom Daschle’s office on October 15:

[W]e were still operating on the assumption that in order for a letter to convey this – it had to be either opened by someone who was opening mail, or in some way

¹⁷ UNITED STATES POSTAL SERVICE MANAGEMENT INSTRUCTION, *Emergency Response to Mail Allegedly Containing Anthrax*, NO. EL-860-1993-3, 1 (October 4, 1999), at <http://www.apwu.org/departments/ir/s&h/anthrax/Anthrax%20Chronology.htm>.

¹⁸ *Id.*

¹⁹ *Id.* at 1, 2.

²⁰ See *House Oversight Hearings, Potter Statement*, *supra* note 6; see also David E. Rosenbaum and Sheryl Gay Stolberg, *A Nation Challenged: The Disease; 2 Workers die and 2 are ill at Capital's postal center; inhaled anthrax indicated*, N.Y. TIMES, October 23, 2001, National Desk, <http://nytimes.qpass.com/search/restricted/article?QProd=19&QIID=F10A13FC3C550C708EDDA90994D94>.

torn or disrupted in the sorting process, because the concept of powder in a sealed letter was one that suggested it would stay with that letter.²¹

Dr. David Satcher, the Surgeon General of the United States, affirmed on NBC's "Today" show, as reported in *The New York Times*, that public health officials were wrong about the possibility of anthrax spores escaping from an envelope during mail processing, "The fact of the matter is, we were wrong, because we haven't been here before."²²

Although officials from the CDC were not aware of this possibility, Canadian officials were well aware of it, prior to October 2001, based on the results of two studies completed in April and September, 2001, respectively.²³ The studies focused on the dispersal patterns of a powdery substance, closely simulating bacillus anthrax, contained inside a normally sealed envelope which was handled in a variety of ways and then opened under controlled conditions. Each of the studies concluded, in part, that an envelope would not have to be opened for one handling it or near it to be at risk for contamination from the powder contained therein. One of the studies ominously stated, [T]hese experiments show that a real 'anthrax letter' would pose a serious threat to not only the person opening the envelope but to others in the room. If the envelope was not completely sealed (e.g., specifically sealing

²¹ Gina Kolata, *A Nation Challenged: The Response; Many Lessons to be Learned with Anthrax*, N.Y. TIMES, October 28, 2001, National Desk, <http://nytimes.qpass.com/search/restricted/article?QProd=19&QIID=F50C16FA34550C7B8EDDA90994D94>.

Dr. Koplan resigned as Director on February 21, 2002. Erin McClam, *CDC Chief Jeffrey Koplan Resigns*, ASSOCIATED PRESS, February 21, 2002, at <http://www.ph.ucla.edu/epi/bioter/koplanresigns.html>.

²² Todd S. Purdum, *A Nation Challenged: The Disease; More Checked for Anthrax; U.S. Officials Acknowledge Underestimating Mail Risks*, N.Y. TIMES, October 25, 2001, National Desk, <http://nytimes.qpass.com/search/restricted/article?QProd=19&QIID=F30D1EF739550C768EDDA90994D94>.

²³ M. CALLAGHAN ET AL., *Investigation on the Dispersal Patterns of Contaminants in Letters*, FORENSIC IDENTIFICATION SECTION, OTTAWA-CARLETON REGIONAL POLICE SERVICES (April 9, 2001), at http://hs.cupw.ca/pdfs/envelope_test_eng.pdf; B. KOURNIKAKIS ET AL., *Risk Assessment of Anthrax Threat Letters*, DEFENSE RESEARCH ESTABLISHMENT SUFFIELD, TECHNICAL REPORT (September 2001) (copy provided to author by William H. Kajola, Industrial Hygienist, Department of Occupational Safety and Health, AFL-CIO, Washington, D.C.) (on file with author).

the open corners), it could also pose a threat to individuals in the mail handling system.²⁴

The Canadian officials tried to warn CDC officials of their findings as early as October 4, 2001, once the first case of anthrax infection from an employee of a Florida tabloid newspaper was publicized.²⁵ Doctor S. Kournikakis, who had taken part in the Canadian study published in September, 2001, emailed a laboratory manager at the CDC on that date regarding the Canadian studies, but the information was not reviewed until approximately October 30, 2001, when another CDC official apparently learned about the Canadian studies.²⁶ In an article in *The Wall Street Journal*, Dr. Bradley Perkins, a CDC epidemiologist, defended the CDC's actions in relation to the emailed Canadian studies by stating, “It is certainly relevant data, but I don't think it would have altered the decisions that we made.”²⁷ Doctor Perkins went on to say that the CDC primarily relied on the fact that no postal employees in Florida were infected from the letter that contained anthrax that killed the employee from mailroom of the tabloid newspaper in early October 2001, and added, “I think more weight would have been put on the Florida experience and the absence of demonstrated risk [among postal workers] than the experimental data.”²⁸ Gerry Kreienkamp, a spokesman for the U.S. Postal Service, said that whether the USPS would have acted more aggressively after the letter to Senator Daschle was opened would have depended on whether the CDC had given them different

²⁴ B. KOURNIKAKIS, *supra* note 23, at 13.

²⁵ Chad Terhune, *Canadian Officials Did Research on Anthrax before U.S. Attacks*, WALL ST. J., December 12, 2001, reprinted by UCLA Department of Epidemiology, School of Public Health, <http://www.ph.ucla.edu/epi/bioter/canadianresearchanthrax.html>.

²⁶ *Id.*; David Brown, *Canadian Study Shows Anthrax's Easy Spread, One Letter Could Cause Many Deaths*, WASH. POST, December 12, 2001, at A27.

²⁷ Terhune, *supra* note 25.

²⁸ Terhune, *supra* note 25. Dr. Kournikakis was quoted as saying it would have been a “difficult call” for CDC officials on whether to give antibiotics to postal workers based on the opening of the letter to Senator Daschle alone, even if they had been aware of his study, because the letter to Senator Daschle was heavily taped on the ends, while the letter used in his study was not so taped. *Id.*

advice at the time.²⁹ He stated, ““We’re not in the public-health field and we don’t keep up with the latest research.””³⁰ An article in *The New York Times*, however, quoted Dr. David Fleming, the CDC’s Deputy Director, as stating, ““If we had any suspicion that there was a risk of inhalation anthrax in any of the workers down the line, we would have moved to aggressively track that down....I think knowing what we know now, different actions might have prevented the illnesses from occurring.””³¹

Increased knowledge from the data in the Canadian studies, particularly when considered with the benefit of hindsight, may very well have changed the advice that CDC officials gave, but their advice was clearly wrong in this case. Tragically, it took the deaths of two postal employees, Mr. Thomas Morris, Jr., and Mr. Joseph Curseen, Jr., to illustrate the point made in those studies. Both men were long time postal employees, were members of the American Postal Workers Union (APWU) and were assigned to Brentwood.³² At a memorial service for each, Postmaster General Potter hailed them as “[P]erfect examples of what makes the Postal Service great ... our people.”³³

The anthrax outbreak of 2001 began in Florida, when two employees for the tabloid newspaper, *The Sun*, got sick.³⁴ The first employee was a photo editor for the newspaper who first became ill on September 27, 2001. He was taken to a hospital for treatment on October 2, 2001, was diagnosed with inhalational anthrax after being

²⁹ *Id.*

³⁰ *Id.*

³¹ Sheryl Gay Stolberg and Judith Miller, *A Nation Challenged: The Response; Officials Admit Underestimating Danger Posted to Postal Workers*, N.Y. Times, October 24, 2001, National Desk, <http://query.nytimes.com/search/restricted/article?res=FA0615FE3E550C778EDDA90994D9404482>.

³² Tanya N. Ballard, *Families, colleagues grieve for postal workers who died from anthrax*, GOV.EXEC.COM, November 13, 2001, Daily Briefing, at <http://www.govexec.com/news/index..cfm?mode=report&articleid=21633&printfriendlyVers=1&>; *House Oversight Hearings*, supra note 6, (testimony of William Burrus, president-elect, American Postal Workers Union) [*hereinafter, Burrus testimony*].

³³ Ballard, *supra* note 32.

³⁴ Katherine McIntire Peters, *Biological terrorism threat commands attention*, GOV.EXEC.COM, October 9, 2001, Daily Briefing, at: www.govexec.com/news/index; J.A. JERNIGAN ET AL, *supra* note 13, at 933-34.

hospitalized for approximately 24 hours, and died on October 5, 2001.³⁵ The second employee of *The Sun* had delivered mail to the first *Sun* employee, and became slightly ill on September 24, 2001.³⁶ His symptoms worsened over the next few days, and he was admitted to the hospital on October 1, 2001.³⁷ He was diagnosed with inhalational anthrax on October 5 and remained hospitalized until his release on October 23.³⁸

Officials from the CDC and various state public health officials in Florida conducted environmental testing at *The Sun*'s (American Media Inc.) facilities, where the two patients worked.³⁹ One environmental sample from the building was positive for anthrax, and a nasal sample from another employee at the building was also positive for anthrax.⁴⁰ The CDC publicly reported these results on October 12, 2001, although members of the United States Postal Inspection Service had begun working with other law enforcement officials investigating the case on October 8, 2001.⁴¹

Officials from the USPS also began taking aggressive measures to communicate with management personnel and USPS' employees regarding the possibility of anthrax contaminated mail. For example, on October 10, 2001, USPS' executives sent a memo to various postal managers in the USPS regarding the need to be prepared to respond to

³⁵ J.A. JERNIGAN ET AL., *supra* note 13, at 933-34.

³⁶ *Id.* at 934.

³⁷ *Id.*

³⁸ *Id.* at 933-36.

³⁹ CENT. FOR DIS. CONTROL, *Notice to Readers: Ongoing Investigation of Anthrax – Florida, October 2001*, MORBIDITY AND MORTALITY WEEKLY REPORT, VOL. 50, No. 40, 877 (October 12, 2001), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5040a5.htm>.

⁴⁰ *Id.*

⁴¹ *Id.*; UNITED STATES POSTAL SERVICE NEWS: PRESS RELEASES, *Statement of Postmaster General/CEO John E. Potter*, October 8, 2001, at www.usps.gov/news/2001/press/pr01_1008pmg.htm. In FY 1999 and FY 2000, “there were approximately 178 Anthrax threats received at courthouses, reproductive health service providers..., churches, schools and post offices, and that 60 such threats were received in FY 2001.” *Id.* See also *House Oversight Hearings, Potter statement, supra* note 6, at 5.

emergencies through the proper maintenance and reliance on Emergency Action Plans.⁴²

Public affairs personnel for USPS also issued a statement on the same day regarding safe mail handling procedures, which was to be copied and posted on all employee bulletin boards, and which indicated in part that there was no known link between the two employees who died in Florida from anthrax and the mail. The statement also gave directions for employees on how to deal with a piece of opened mail that a customer might bring in, fearing it contained anthrax, and also how to react to a customer who might reject receipt of a piece of mail because of fear of anthrax contamination.⁴³

At the same time, the number of anthrax cases continued to grow. On October 9, 2001, CDC officials were notified by New York City public health officials of a person with a skin lesion that was suspected and later confirmed to be cutaneous anthrax.⁴⁴ By October 16, two cases of cutaneous anthrax had been confirmed in New York City. One of the infected persons, an employee at NBC News, handled a letter at work which was post marked September 18, that contained a powder which was later confirmed to be

⁴² Memorandum from USPS, to Vice Presidents, Area Operations Manager, Capital Metro Operations, *Re: Emergency Action Plans* (October 10, 2001), at <http://www.apwu.org/departments/ir/s&h/anthrax/Other%20USPS%20Information/October%2010th%20-%20Emergency%20Action%20Plans.PDF>. The USPS' policy, ELM § 850-2001-2, required all postal facilities with more than 10 employees to have a written emergency action plan, while those facilities with less than 10 employees could verbally communicate a plan among the employees. UNITED STATES POSTAL SERVICE MANAGEMENT INSTRUCTION, *Emergency Evacuation and Fire Prevention*, EL-850-2001-2, at <http://www.apwu.org/departments/ir/s&h/anthrax/Anthrax%20Chronology.htm>.

⁴³ USPSNEWSBREAK P.M., *Safe mail handling procedures – they are very important, especially now*, (October 10, 2001, 4:30 p.m.), <http://www.apwu.org/departments/ir/s&h/anthrax/uspsnewsbreaks/uspsnewsbreak%20p.m.%20Oct.%2010,%202001%20430pm.PDF>.

⁴⁴ CENT. FOR DIS. CONTROL, *Update: Investigation of Anthrax Associated with Intentional Exposure and Interim Public Health Guidelines*, MORBIDITY AND MORTALITY WEEKLY REPORT, VOL. 50, NO. 41, 889-893 (October 19, 2001), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5041a1.htm>.

anthrax.⁴⁵ The second person with cutaneous anthrax was a 7 month old baby who had been taken to his mother's workplace on September 28.⁴⁶

On October 11 and 12, 2001, USPS' officials sent additional information to its postmasters, supervisors, and employees about proper procedures for handling mail that was suspected of being contaminated with anthrax, or some other type of chemical or biological weapon, and also information regarding anthrax in general.⁴⁷ The opening sentence of each of these statements articulated what had become a common theme from postal officials: "There have been no confirmed incidents of chemical or biological weapons transported by mail."⁴⁸ One of the documents entitled "Mandatory Safety Talk on Anthrax," which was sent to postmasters, district managers, and plant managers on October 11, 2001, also gave explicit instructions for employees, supervisors, and managers, regarding the appropriate steps to take in response to "suspicious looking mail piece(s)."⁴⁹

Despite the repeated message that there were no confirmed cases of the use of the mail to send chemical or biological weapons, it is clear that authorities – including postal authorities, suspected that anthrax may have been sent through the mail, given the

⁴⁵ *Id.*; USPSNEWSTALK, *Gloves and masks: Let's talk about your safety, Special Edition* (October 15, 2001), <http://www.apwu.org/departments/ir/s&h/anthrax/USPSNEWSTALK/USPSNEWSTALK%20Oct.%2015,%202001.PDF>.

⁴⁶ CENT. FOR DIS. CONTROL, *supra* note 44.

⁴⁷ USPSNEWSTALK, SPECIAL EDITION, FOR POSTAL SUPERVISORS AND POSTMASTERS, *Zero incidents confirmed: No biological or chemical weapons transported by mail* (October 11, 2001), <http://www.apwu.org/departments/ir/s&h/anthrax/USPSNEWSTALK/USPSNEWSTALK%20Oct.%2011,%202001%20Special%20Edition.PDF>; USPSNEWSBREAK A.M., *Keeping employees in the know about handling suspicious parcels* (October 12, 2001, 10 a.m.), <http://www.apwu.org/departments/ir/s&h/anthrax/uspsnewsbreaks/uspsnewsbreak%20a.m.%20Oct.%2012,%202001%2010am.PDF>.

⁴⁸ USPSNEWSTALK, SPECIAL EDITION, *supra* note 47; USPSNEWSBREAK A.M., *supra* note 47.

⁴⁹ USPSNEWSBREAK A.M., *supra* note 47; see also UNITED STATES POSTAL SERVICE, *Mandatory Safety Talk on Anthrax* (October 2001), 2, <http://www.apwu.org/departments/ir/s&h/anthrax/uspsnewsbreaks/uspsnewsbreak%20a.m.%20Oct.%2012,%202001%2010am.PDF>.

substance of the messages being sent and given the involvement of Postal Inspection Service investigators in the criminal investigation of the Florida cases as of October 8, 2001.⁵⁰ Postal officials were clearly wrestling with a growing crisis that presented a dilemma of immense proportions: the balancing of considerations of worker safety against the public's confidence in the safety of the mail and the devastating financial impact that a significant disruption of mail service would certainly bring.⁵¹ In the midst of the crisis, Postmaster General Potter told a subcommittee of the Senate Committee on Appropriations that the combined losses for the postal service of responding to the anthrax crisis, along with declining revenues exasperated both by the events of September 11th and the anthrax crisis because of decreased mail use, could reach \$5 billion for the fiscal year.⁵²

Postal officials definitively knew of a link between the mail and anthrax on October 13, 2001, when they learned that the infection of an employee of NBC News in New York City had been caused by exposure to contaminated mail in her workplace.⁵³

⁵⁰ See *House Oversight Hearings, Potter statement, supra*, note 6. "Early on, when there was confusion about how and when anthrax got to American Media in Boca Raton, we saw no direct connection to the Postal Service and the system that delivers the mail. Nevertheless, on Tuesday, October 9th, as a precaution, we provided supervisors and employees with updated information no what to do if they suspected biohazards in the mail." *Id.*

⁵¹ The USPS delivers approximately 608 million pieces of mail a day. As of October 15, 2001, this meant that postal officials had delivered more than 18 billion pieces of mail since September 11, 2001, alone. USPSNEWBREAK P.M, *Gloves and masks are okay where they do not create a hazardous situation* (October 15, 2001, 8 p.m.), <http://www.apwu.org/departments/ir/s&h/anthrax/uspsnewsbreaks/uspsnewsbreak%20p.m.%20Oct.%202001%208pm.PDF>. "It's not far-fetched to imagine that this could hurt us to the tune of several billion dollars," *House Oversight Hearings, Potter statement, supra*, note 6; see also David E. Sanger and Neil A. Lewis, *Officials Fail to Guarantee Mail Is Not Contaminated*, N.Y. TIMES, October 31, 2001, National Desk, <http://nytimes.qpass.com/search/restricted/article?QProd=19&QIID=F60E1EFA39540C728FDDA90994D94>.

⁵² *Financial Security of the U.S. Postal Service, Before the Subcommittee on Treasury and General Government Committee on Appropriations*, United States Senate, 107th Cong. (November 8, 2001) (statement of postmaster general/ceo John E. Potter) [hereinafter, *Potter statement*], available at http://www.usps.com/news/2001/press/pr01_1108pmg_print.htm.

⁵³ *House Oversight Hearings, Potter statement and testimony, supra* note 6.

This information prompted USPS officials to order testing for anthrax exposure of postal employees at the main post office in Boca Raton, FL, because this post office provided mail service to the offices of American Media Inc., where the first two cases of anthrax infection developed.⁵⁴ While all of the tests returned negative, 30 of the 109 employees at the facility began taking antibiotics as a precautionary measure, and environmental testing of the facility found “trace results of anthrax....”⁵⁵

On Monday, October 15, the pace of developments increased exponentially for postal officials and others involved in the rapidly expanding crisis. On that day, they told postal employees that employees from the Boca Raton facility had tested negative for exposure to anthrax, and also told them that a “minuscule amount of anthrax spores were found in a small, non-public area of the Boca Raton post office.”⁵⁶ The same message added that employees who were potentially at risk for exposure to anthrax were placed on antibiotics last week, and stated that public health officials did not recommend any further testing or medical treatment for other postal employees at the Boca Raton post office, visitors who had been to the post office, or for persons who received mail from that facility.⁵⁷

At this point, postal officials along with the public health officials who were advising them knew that anthrax had been carried through the mail on at least one occasion (the NBC employee case), and must have realized that anthrax had escaped from an envelope or package during mail processing at the Boca Raton post office, based

⁵⁴ *House Oversight Hearings, Potter statement, supra note 6*; CENT. FOR DIS. CONTROL, *Investigation of Bioterrorism-Related Anthrax and Interim Guidelines for Exposure Management and Antimicrobial Therapy*, MORBIDITY AND MORTALITY WEEKLY REPORT, VOL. 50, NO. 42, 909 (October 26, 2001).

⁵⁵ *House Oversight Hearings, Potter statement, supra note 6*.

⁵⁶ USPSNEWSBREAK P.M, *Boca Raton employees test negative for anthrax* (October 15, 2001, 5 p.m.), <http://www.apwu.org/anthrax.bocapo.htm>.

⁵⁷ *Id.*

on the presence of a “minuscule” amount of anthrax in the Boca Raton post office. How else could a “minuscule” amount of anthrax gotten into a small, non-public area of the Boca Raton post office?

Postal officials continued to try and communicate with postal employees on October 15. At 2 p.m. that day, USPS’ officials issued a statement, to be copied and posted on all employee bulletin boards, providing that employees who wished to wear gloves and masks while handling mail could do so if they so chose.⁵⁸ The statement also added, “There has been one incidence of anthrax bacteria being delivered through the mail, the first documented case of a hazardous biological substance sent through the U.S. Mail.”⁵⁹ Postal officials also sent out a notice to supervisors and postmasters on the same day, requiring them to provide and document “stand up talks” to postal employees regarding biological substances, anthrax, and emergency action plans.⁶⁰ This message also told supervisors and postmasters to tell window clerks and other employees who handle the mail to no longer “deliberately shake or empty the contents of any suspicious envelope or package,” which was a change in policy from what they had been telling them in the past.⁶¹ This change in policy clearly indicates that postal officials now believed that anthrax could escape from an envelope or package during mail processing,

⁵⁸ USPSNEWSBREAK P.M., *Employees who handle mail can use gloves or masks if they wish* (October 15, 2001, 2 p.m.), <http://www.apwu.org/anthrax.gloves.htm>.

⁵⁹ *Id.*

⁶⁰ USPSNEWSTALK, SPECIAL EDITION, *Gloves and masks: Let’s talk about your safety* (October 15, 2001), <http://www.apwu.org/departments/ir/s&h/anthrax/USPSNEWSTALK/USPSNEWSTALK%20Oct.%202001.PDF>.

⁶¹ *Id.* at 2.

at least if it was shaken by a mail handler, and was apparently based on a CDC Health Advisory that was issued through the Health Alert Network on October 12.⁶²

Postal officials also formed a Mail Security Task Force on October 15 to help facilitate their response to the quickly expanding crisis.⁶³ This team consisted of personnel from the Postal Inspection Service, the Office of Inspector General, Postal Service medical and safety professions, management officials, union officials, and mailers.⁶⁴ This task force served as a conduit for outside experts, such as members of the CDC among others, to advise postal officials regarding the situation, and it also included representatives of the APWU, along with officials from other postal unions as well as representatives of non-union employees.⁶⁵

Monday the 15th was a watershed day for another reason because that is when an anthrax laced letter was first discovered on Capitol Hill. On that day, an aide to Senator Tom Daschle opened an envelope that was sealed with tape and filled with approximately 2 grams of a powdery substance at the senator's office complex in the Hart Senate Office Building.⁶⁶ One reporter described the opening of the envelope as "releasing a puff of spores."⁶⁷ Senator Daschle's office was quickly quarantined, the mail system for the Capitol was shut down, public tours of the Capitol were stopped, and numerous people

⁶² CENT. FOR DIS. CONTROL, *Health Advisory, How to Handle Anthrax and Other Biological Agent Threats*, (October 12, 2001),

<http://www.apwu.org/departments/ir/s&h/anthrax/CDC/CDC%20%20Alert%20October%2012.pdf>.

⁶³ *House Oversight Hearings, Potter statement*, *supra* note 6.

⁶⁴ *Id.*

⁶⁵ *House Oversight Hearings, Potter statement, Burrus statement*, *supra* note 6.

⁶⁶ THE WORKING GROUP ON CIVILIAN BIODEFENSE, *supra* note 7, at 4; Sheryl Gay Stolberg, *A Nation Challenged: The Government Response; A Quick Response for Politicians; A Slower One for Mail Workers*, N.Y. TIMES, October 23, 2001, National Desk,

<http://query.nytimes.com/search/restricted/article?res=F20C1EFF3C550C708EDDA90994D9404482>.

⁶⁷ Andrew C. Revkin, *A Nation Challenged: The Daschle Letter; Trail of Death and Illness on a Tainted Letter's Path*, N.Y. TIMES, October 31, 2001, National Desk,

<http://nytimes.qpass.com/search/restricted/article?QProd=19&QIID=F70A1EFB39540C728FDDA90994D94>.

who worked in or near the offices of Senator Daschle were prescribed the antibiotic Cipro, along with being tested for anthrax.⁶⁸ Nasal swab tests, although now deemed unreliable for diagnosis of inhalational anthrax infection, were positive for anthrax in 28 people who were in or around Senator Daschle's office at the time the letter was opened, and for six persons who were "first responders" to the incident.⁶⁹ Environmental tests confirmed what had been suspected – that anthrax spores had been aerosolized, and led authorities to shut down the building of approximately 1 million square feet on October 17.⁷⁰ A second contaminated letter, sent to Senator Patrick Leahy, was not discovered until November 17 because it was impounded with other mail once the letter to Senator Daschle was first discovered.⁷¹ The path that these letters took, particularly through Brentwood, proved to have a devastating effect on several postal employees including Thomas Morris, Jr.

The letters to Senators Daschle and Leahy had been processed through Brentwood on Friday, October 12, 2001.⁷² Both letters were processed at 7:10 a.m. for delivery through bar-code sorter 17 (known as a DBCS), a machine through which envelopes travel for sorting at a high rate of speed and through which the envelopes are "pinched" at various points while being processed.⁷³ This machine was later cleaned, sometime between 8 a.m. and 9:40 a.m. the same morning, with a strong blast of compressed air,

⁶⁸ Stolberg, *supra* note 66.

⁶⁹ CENT. FOR DIS. CONTROL, *supra* note 54, at 912.

⁷⁰ CENT. FOR DIS. CONTROL, *Evaluation of Bacillus anthracis Contamination Inside the Brentwood Mail Processing and Distribution Center – District of Columbia*, MORBIDITY AND MORTALITY WEEKLY REPORT, VOL. 50, NO. 50, 1129 (October 2001); John Heilprin, *Fear Surrounds Hart Reopening*, ASSOCIATED PRESS, January 22, 2002, at www.canoe.ca/CNEWSAttack0201/22_hart-ap.html. The Hart Senate Office Building remained closed for decontamination until January 22, 2002. Cleanup costs were estimated between \$14 million and \$23 million. *See also* THE WORKING GROUP ON CIVILIAN BIODEFENSE, *supra* note 7, at 23.

⁷¹ CENT. FOR DIS. CONTROL, *supra* note 70, at 1129-1133.

⁷² *Id.* at 1129.

⁷³ *Id.*; Interview with Corey Thompson, Safety Director, American Postal Worker's Union, in Washington, D.C. (March 5, 2002).

which was the typical practice at that time.⁷⁴ It appears that this stage in the processing, along with other points where the envelopes would have been moved around by sorting and transporting machines, is where spores would have come out of the envelopes and potentially aerosolized into the surrounding environment.⁷⁵ The subsequent blast of compressed air to clean the DBCS 17 would likely have helped with the aerosolization and spreading of the released spores.⁷⁶ Mr. Morris must have been exposed to spores of anthrax while working between Friday, October 12, and Tuesday, October 16, even though he apparently did not realize it at the time. His lack of knowledge about the definite time of exposure reflects one of the greatest dangers of an aerosolized release of anthrax, that it is potentially “colorless and invisible.”⁷⁷

Officials from the CDC and USPS knew on Monday, October 15, that the contaminated letter to Senator Dashcle had passed through Brentwood, but no environmental testing was done there until Thursday, October 18.⁷⁸ Authorities were apparently so confident that there was no danger at Brentwood that they held a press conference there on Thursday the 18th to announce the offering of a \$1 million reward for information leading to the discovery of those behind the anthrax crisis.⁷⁹ Brentwood was not closed down until Sunday, October 21, when Mr. Leroy Richmond, a postal

⁷⁴ CENT. FOR DIS. CONTROL, *supra* note 70, at 1129.

⁷⁵ *Id.* at 1132.

⁷⁶ *Id.* The use of compressed air to clean sorting machines has been discontinued, and postal employees now use a vacuum system to help avoid this type of situation. *See also* Revkin, *supra* note 67.

⁷⁷ THE WORKING GROUP ON CIVILIAN BIODEFENSE, *supra* note 7, at 4; *see* Conference Proceedings, *Protecting Emergency Responders, Lessons Learned from Terrorist Attacks*, RAND SCIENCE AND TECHNOLOGY POLICY INSTITUTE (Dec. 2001), <http://www.rand.org/publications/CF/CF176/CF176.pdf>. According to one emergency responder, “The problem is, you can’t assess the damage by just being there, like you can with something else. With the World Trade Center, you know what you have. It’s totally different [with anthrax]. You’re not even sure if you have a problem when you get a call for anthrax in the post office.... You can’t see the hazards you’re dealing with.” *Id.* at 16.

⁷⁸ *House Oversight Hearings, Potter statement, supra* note 6. According to Postmaster General Potter, the initial environmental tests were negative for anthrax and they had to await results of more comprehensive laboratory tests of additional samples which took between 48 hours to 72 hours to process. *Id.*

⁷⁹ *Id.*

employee at Brentwood, was diagnosed with inhalational anthrax after being hospitalized at a Virginia hospital on Friday, October 19.⁸⁰ Further, no postal employees from Brentwood were tested or given antibiotics during the critical days between the 15th and 21st.⁸¹ Even though officials involved in this crisis have repeatedly said that this is not a time or case for finger pointing, this delayed response was critical and almost certainly contributed to Mr. Morris' death.⁸²

Mr. Morris first felt sick on Tuesday, October 16, when he had a fever, cough, and other symptoms.⁸³ On Thursday, October 18, he went to a local medical center and told the treating nurse practitioner that he thought he might have been exposed to anthrax because of where he worked and because of what had occurred with the envelope with powder in it.⁸⁴ He was diagnosed with a virus and was sent home without being prescribed antibiotics.⁸⁵ During the early morning hours of Sunday, October 21, his symptoms worsened to the point that he called 911 for help.⁸⁶ His fearful pleas for help and the subsequent treatment that he received proved too late as he died later on Sunday at a D.C. area hospital.⁸⁷

⁸⁰ *Id.*; Diana Jean Schemo, *A Nation Challenged: The Disease; Postal Employee in Washington Has Anthrax in Lungs*, N.Y. TIMES, October 22, 2001, National Desk, <http://nytimes.gpass.com/search/restricted/article?QProd=19&QIID=FB0F1EF8345A0C718EDDA90994D94>.

⁸¹ *House Oversight Hearings, Potter statement, supra* note 6.

⁸² *Id.* Postmaster General Potter stated: "Last week I said, this is not a time for finger pointing. I underscore that again. The mail and the Nation have never experienced anything like this." *Id.*

⁸³ J.A. JERNIGAN ET AL., *supra* note 13, at 933, 937.

⁸⁴ ASSOCIATED PRESS, *supra* note 1; Estate of Thomas L. Morris, Jr., et al. v. Kaiser Foundation Health Plan of the Mid-Atlantic States, et al., No: 02-07682 (Md. Cir. Ct., filed March 28, 2002). The author notes that this case was removed to United States District Court, D.MD., in April 2002.

⁸⁵ A. JERNIGAN ET AL., *supra* note 13, at 933, 937.

⁸⁶ ASSOCIATED PRESS, *supra* note 1.

⁸⁷ A. JERNIGAN ET AL., *supra* note 13, at 933, 937.

In his 911 call, Mr. Morris said that he was in the vicinity of an envelope that a female co-worker found one week earlier, on Saturday, October 13.⁸⁸ He said that the envelope had powder in it and that they reported it to their supervisor at the time. He also said that he was never told whether or not it was anthrax, although he also said that he was “told that it wasn’t, but I have a tendency not to believe these people.”⁸⁹ It is unclear whether his assertions were accurate regarding whether he was told of the results of any testing on the contents of the letter, but it is also hard to imagine that he would lie under the circumstances of his 911 call.

In a press release on November 7, the same day that the text of Mr. Morris’ 911 call was being released to the media, USPS’ officials first confirmed the fact that there was a letter with powder in it, as Mr. Morris had alleged.⁹⁰ It was not until the next day, November 8, that USPS’ officials publicly asserted, for the first time, that Mr. Morris had been told that the test results for the letter with powder in it were negative for anthrax. Their statement read in part: “The letter tested negative and Brentwood employees, including Morris, were told of the results. From the day the Daschle letter was opened until Morris’ death, public health authorities unanimously assured the Postal Service that workers in the Brentwood Road facility were not at risk.”⁹¹

On the same day, several comments about the envelope with powder that Mr. Morris mentioned were attributed in various news stories to Deborah Willhite, a senior

⁸⁸ *A Postal Worker’s Correct Fear*, *supra* note 84.

⁸⁹ *Id.*

⁹⁰ UNITED STATES POSTAL SERVICE NEWS: *Press Releases, Statement - On the 911 telephone call made by the late Tomas L. Morris Jr.* (November 7, 2001, 4:25 p.m.), http://www.usps.com/news/2001/press/pr01_1107statement_print.htm. At the top of the statement of 4:25 p.m. is a box with a notation, issued at 7:50 p.m., November 7, 2001, providing information regarding the testing of the envelope that Mr. Morris discussed in his 911 call. *Id.*

⁹¹ USPSNEWSBREAK A.M., *TV stations air Morris 911 tape, USPS calls death a tragedy: “He is a victim of terrorism”* (Nov. 8, 2001, 9 a.m.), http://www.usps.com/news/2001/press/pr01_1108_911.htm.

vice president with USPS. In an Associated Press (AP) story of November 8, 2001, Ms. Willhite was quoted as saying regarding this issue, ““We don’t know for certain what he is talking about....I’m not downplaying what Mr. Morris experienced because we don’t know for sure, but it could or could not be a significant lead....We simply won’t know until we can reconstruct what went on at that point in time.””⁹² The same AP story indicated that Ms. Willhite said that investigators had started interviewing Mr. Morris’ co-workers as of “Wednesday” to try and determine what had occurred regarding the envelope in question, but that this was difficult for them to do because work records inside Brentwood had been sealed up when the building was closed on October 21.⁹³ In a separate news story in *The New York Times* on November 8, Ms. Willhite reportedly said, ““When the letter was called to the supervisor’s attention, the supervisor set it aside and turned it over to the inspector on duty. The inspector gave it to the F.B.I. The F.B.I. sent it to be tested. It tested negative.””⁹⁴ She added that the Brentwood employees had been told of the negative test results in a ““stand-up talk,”” although she apparently did not disclose any further information at that time about the date the talk was given or whether or not Mr. Morris had been at work or was otherwise present for the briefing.⁹⁵ In the complaint of a wrongful death lawsuit filed by Mr. Morris’ estate and surviving family members against his health care provider, the plaintiffs have asserted that Mr. Morris was

⁹² ASSOCIATED PRESS, *Postal inspectors investigate dying worker’s 911 call about a tainted letter*, (November 8, 2001, 11:00 a.m.), at http://www.courttv.com/assault_on_america/1108_911call_ap.html.

⁹³ *Id.* The article implies that the “Wednesday” Ms. Willhite referred to was Wednesday, November 7, 2001. *Id.*

⁹⁴ David E. Rosenbaum, *A Nation Challenged: The Disease; Worker Who Died Suspected Anthrax Was Root of Illness*, N.Y. TIMES, November 8, 2001, National Desk, <http://nytimes.qpass.com/search/restricted/article?QProd=19&QIID=F70F15F8355D0C7B8CDDA80994D>

⁹⁵ *Id.*

never told of the results of any testing on the envelope with powder that he mentioned in his 911 call.⁹⁶

Ms. Willhite's public comments raise a troubling question of whether or not postal officials followed their own policy of October 1999 regarding the proper response to envelopes suspected of anthrax contamination.⁹⁷ Were emergency response personnel ever involved in the incident? If so, then why would postal investigators have waited until after Brentwood was closed down on Sunday, October 21, to gather the facts about the suspected letter from October 13, particularly in the midst of the anthrax crisis that was quickly burgeoning beyond control? Despite the fact that the letter ultimately tested negative for anthrax, it is important to consider whether enough attention was paid to the incident when it occurred, by persons at the proper levels of authority. If the importance of the letter of October 13 as a cause for concern did not register on that day or the next, then it seems it certainly should have registered as of Monday night, October 15, when postal officials and CDC officials knew that the letter to Senator Daschle had been processed through Brentwood (that is assuming that CDC officials were actually told of the suspected letter before it was too late).⁹⁸

While these issues remain unsettled, of this one can be certain – Mr. Morris' died primarily because of terrorist activity that he encountered while at work, and that before he died, he experienced the type of fear which is a key by product of terrorist activity.⁹⁹ His pleas for help in his 911 call reflect this fear, as USPS' officials acknowledged in their statement of November 7, which read: "The 911 call Mr. Morris placed early on the

⁹⁶ *Estate of Thomas L. Morris, Jr., et al., supra* note 84.

⁹⁷ See UNITED STATES POSTAL SERVICE MANAGEMENT INSTRUCTION, *supra* note 17.

⁹⁸ See House Oversight Hearings, *Potter statement, supra* note 6.

⁹⁹ *Id.*

day he died shows that his body was telling him something that no one else had. ‘He was deeply – and justifiably – worried....All of us would feel the same.’¹⁰⁰ His death also shows that in this case information alone was not enough to successfully combat both the fear and the deadly results of the terrorist act to which he fell prey.¹⁰¹

While the purpose of this article is not to assign blame for Mr. Morris’ death, it is clear that grave mistakes were made particularly by officials from the CDC, which directly affected the decisions of USPS’ officials and which, in hindsight, partially contributed to Mr. Morris’ death. The situation was certainly frantic and many decisions had to be rapidly made with less than perfect data upon which to make them. Authorities were faced with a terrorist act which exceeded the known bounds of science – well, at least the bounds of science known to officials from the CDC, as opposed to Canadian officials, at the crucial time.

Mr. Morris’ employer did not prevent him from being infected by anthrax while he was at work. Neither did officials from the CDC, along with the myriad of other experts who were working on the case. His vulnerability to attack raises the crucial question of whether he could have successfully tried to protect himself in that situation by choosing not to go to work at Brentwood at various times in the midst of this crisis?

III. The Right to Refuse Hazardous Work amidst the Anthrax Crisis of 2001

A. Varying Rights Beyond 29 C.F.R. § 1977.12 (b)(2)

Various sources of law provide employees with the right to refuse hazardous work, and the standards vary for each. Section 7 of the National Labor Relations Act (NLRA) protects a covered employee’s right “[T]o form, join, or assist labor organizations, to

¹⁰⁰ UNITED STATES POSTAL SERVICE NEWS, *supra* note 90.

¹⁰¹ See *House Oversight Hearings, Potter statement*, *supra* note 6.

bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....”¹⁰² An employee’s rights under § 7 have been held to include the right to refuse to work because of adverse health or safety conditions, where such activity on the part of the employee is deemed to be protected, concerted activity.¹⁰³ The conditions under which a covered employee can exercise the right to refuse hazardous work under § 7 will vary depending on whether the employee is represented by a union and covered by a collective bargaining agreement with the employer.¹⁰⁴

Employees who concertedly refuse to perform a task that they honestly believe to be dangerous will be protected under § 7 of the NLRA, where they are not represented by a union, even if their belief about the danger is deemed unreasonable.¹⁰⁵ In contrast, if the employee is represented by a union and is subject to a collective bargaining agreement, then the employee’s refusal to perform assigned work based upon safety or health concerns flowing from the collective bargaining agreement will be upheld so long as the employee’s conduct is “reasonably directed toward the enforcement of a collectively bargained right,” and so long as the employee has an honest and reasonable belief that the situation violates the provisions of the collective bargaining agreement, whether or not the employee’s belief is ultimately proven to be correct.¹⁰⁶

¹⁰² 29 U.S.C.A. § 157.

¹⁰³ *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). *See also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). *See also Meyers Industries, Inc.*, 281 NLRB No. 118 (1986) (“Meyers II”), *enforced*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

¹⁰⁴ *Washington Aluminum*, 370 U.S. at 15.

¹⁰⁵ *See Id.*; *see also NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171 (8th Cir. 1982); *Odyssey Capital Group and Phillip D. Demas*, 2000 NLRB LEXIS 61 (2000).

¹⁰⁶ *NLRB v. City Disposal Systems*, 465 U.S. at 837, 840 (1984). The NLRB’s *Interboro* doctrine provides that an “individual’s assertion of a right grounded in a collective-bargaining agreement is recognized as ‘concerted activit[y]’ and therefore accorded the protection of § 7.” *Id.* (citing *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966)). *See also NLRB v. PIE Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir.

Where employees are represented by a union and are subject to the provisions of a no strike clause in a collective bargaining agreement, a union must generally “present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous conditions for work exists” in order for a work stoppage to be upheld under § 502 of the Labor Management Relations Act.¹⁰⁷ Section 502 provides in part, “[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.”¹⁰⁸ The Supreme Court initially described this provision as a “limited exception to an express or implied no-strike obligation.”¹⁰⁹

In *TNS, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO*, in a remanded case of first impression, the NLRB determined that a work stoppage by employees when faced with the dangers of cumulative exposure to radioactive and toxic substances at work was justified under § 502 and thus was not an illegal strike.¹¹⁰ In *TNS*, the NLRB relied on the definition of the term ““abnormal”” as ““deviating from the normal condition or from the norm or average,”” and adopted the following test to determine if the justification of a work stoppage under § 502 in “cases involving

1991) (stating, “Though incorrect, however, an employee’s understanding of the collective bargaining agreement may nevertheless be reasonable.”)

¹⁰⁷ *Gateway Coal Co. v. United Mine Workers of America*, 414 US368, 387 (quoting Rosenn, J., dissenting, 466 F.2d at 1162); *see also NLRB v. Redwing Carriers, Inc.*, 130 NLRB 1208, 1209 (1961).

¹⁰⁸ 29 U.S.C.A. § 143.

¹⁰⁹ *Gateway Coal Co.*, 414 US at 385. “The word ‘strike’ is generally understood to mean a cessation of work by employees, accompanied by picket lines which in combination impair or prevent production in all of the employer’s premises.” *Jones & Laughlin Steel Corp. v. United Mine Workers of America*, 519 F.2d 1155 (3rd Cir. 1975). Under 29 U.S.C.A. § 501 (2), strike “includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.”

¹¹⁰ *TNS, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO*, 329 NLRB No. 61 (1999) [hereinafter *TNS, Inc.*]. The Board determined that because the employees were protected under § 502, they were not economic strikers and could not be permanently replaced by their employer.¹¹⁰

cumulative, slow-acting dangers to employee health and safety.”¹¹¹ The General Counsel must show,

[B]y a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees’ belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.¹¹²

In formulating this test, the Board rejected an assertion that § 502 should apply “only when the General Counsel has proved that working conditions were *in fact* abnormally dangerous.”¹¹³

In the *TNS* case, the NLRB concluded that the employees were justified in walking off the job because of their good faith belief that they were being exposed to harmful amounts of radiation and other toxins while at work, and because their belief was reasonably based on the objective evidence provided in the case.¹¹⁴ The objective evidence included evidence that the facility’s air quality exceeded permissible limits in the months immediately prior to the strike, that the employees’ extended use of respirators was negatively effecting their health, that the ““employees’ average whole body uranium exposures were far greater than those typical for the nuclear industry,”” and that repeatedly high levels of uranium found in employees’ urine illustrated high risk of kidney damage among the employees.¹¹⁵ An additional piece of objective evidence was that these conditions were not alleviated ““because Respondent failed to comply

¹¹¹ *Id.* at 6 (quoting *Fruin-Colnon Construction Co.*, 139 NLRB 894 (1962), *enf. denied on other grounds*, 330 F.2d 885 (8th Cir. 1964)).

¹¹² *TNS, Inc.*, 329 NLRB No. 61, at 5.

¹¹³ *Id.* at 2, n. 7 (emphasis in original); see *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974) (rejecting adherence to a ““safe-in-fact” standard” under § 502 in case where an employee refused to drive a truck because he believed it was unsafe, and the truck was subsequently driven nearly 800 miles without incident); *but see infra*, Part V, 104-110.

¹¹⁴ *TNS, Inc.*, 329 NLRB No. 61, at 8.

¹¹⁵ *Id.* (quoting the administrative law judge’s decision).

diligently with governmental codes prescribing sound health physics practices.”¹¹⁶ In finding that this evidence adequately supported the employees’ beliefs about the level of danger, the NLRB reasoned that their belief was “confirmed by either scientific testing or regulatory oversight,” noted that some of it was known to the employees in the months immediately prior to their walkout, and also reasoned that it supported their conclusion regarding the immediate nature of the danger that was present.¹¹⁷

The NLRB also indicated that it would consider in future cases, on a case by case basis, some or all of the following factors, [W]hether conditions appeared to be deviating from the norm or from a reasonable level of risk; whether equipment intended to protect employees from exposure to toxic substances appeared to be operating in a manner sufficient to afford such protection; whether employees had received sufficient instruction in the use of safety equipment to render that equipment effective; and whether management policies mandated and supported the proper use of safety equipment and standards for handling dangerous substances; and any negative evaluations from regulatory agencies and any failure of the employer to correct serious infractions.¹¹⁸

Regarding the issue of whether employees were facing ““an immediate, presently existing danger,”” the Board concluded that the danger must have been direct and existing at the time that the walkout began, but also concluded that in cases of cumulative danger, [T]he issue will not be whether employees should suddenly leave, but rather whether a presently existing, reasonable possibility of serious incipient or future illness or injury existed. In some instances, when latency periods have run their course, historical analysis may sadly prove

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 8.

¹¹⁸ *Id.* at 7.

that employees waited far too long to cease work in order to protect themselves from such immediate dangers.¹¹⁹

Finally, the NLRB noted that the parties in the case had relied on evidence that arose after the work stoppage took place and that none of the parties had objected to the use of such evidence.¹²⁰ The Board stated that when such objections are made, “[W]e shall consider them in deciding the relevance and weight to be accorded the evidence under the totality of circumstances presented in that particular case.”¹²¹ The Board added that such evidence could be relevant regarding the issue of whether the employees’ belief about the existence of abnormally dangerous conditions was supported by ““ascertainable, objective”” facts.¹²²

In *TNS, Inc.*, the NLRB reviewed its past decisions regarding the types of ascertainable, objective evidence required under § 502 in order to “support employees’ good faith belief that the perceived dangers at their workplace pose an immediate threat of harm to their health and safety.”¹²³ In so doing, the Board observed that the cases seemed to fall within two broad categories. The first are cases where “risks that are ordinarily present have been intensified.”¹²⁴ The second category consists of cases where the NLRB found that abnormally dangerous conditions did not exist, against the background of a workplace in which inherent dangers already existed.¹²⁵ The NLRB

¹¹⁹ *Id.*

¹²⁰ *Id.* at 7, n. 31.

¹²¹ *Id.*

¹²² *Id.* (citation omitted in original).

¹²³ *Id.* at 6.

¹²⁴ *Id.*; see *Fruin-Colnon Construction Co.*, 139 NLRB 894 (1962), *enf’d denied on other grounds* 330 F.2d 885 (8th Cir. 1964); *Knight Morley Corp.*, 116 NLRB 140, 142 (1956), *enforced* 251 F.2d 753 (6th Cir. 1957); *Philadelphia Marine Trade Assn.*, 138 NLRB 737 (1962), *enforced* 330 F.2d 492 (3d Cir. 1964); *Richmond Tank Car Co.*, 264 NLRB 174 (1982); *Roadway Express, Inc.*, 217 NLRB 278 (1975).

¹²⁵ *TNS, Inc.*, 329 NLRB No. 61, at 6; see *Beker Industries Corp.*, 268 NLRB 975, 976-977 (1984); *Mine Workers, District 6*, 217 NLRB 541, 551 (1975); *Union Independiente de Empleados de Servicios*, 249 NLRB 1044 (1980).

affirmed the importance of the principle expressed in *Gateway Coal* by the Supreme Court, that an employee's "purely subjective impression of danger will not suffice," nor would a generalized, "speculative doubt about safety...."¹²⁶ The Board stated, "The General Counsel, however, will not be required to show that injury has already occurred....Rather, the reference point for assessing Section 502 coverage will be the conditions in a facility as they presented themselves to the employees."¹²⁷

In addition to statutory protections under the NLRA, employees may have a right to refuse hazardous work based on the terms of a collective bargaining agreement.¹²⁸ Additional rights may also be found in state and local laws. Several states have statutory provisions that allow employees to refuse hazardous work under varying standards and conditions. For example, Ohio law provides public employees with a right to refuse to work "under conditions that the public employee reasonably believes present an imminent danger of death or serious harm to the employee, provided that such conditions are not such as normally exist for or reasonably might be expected to occur in the occupation of the public employee."¹²⁹ Similarly, under Minnesota law, an employee "acting in good faith has the right to refuse to work under conditions which the employee reasonably believes present an imminent danger of death or serious physical harm to the employee."¹³⁰ Other states authorize an employee to refuse to work in situations where an employer has failed to provide information regarding hazardous substances at the worksite to the employee in a timely manner, after the employee requested it.¹³¹

¹²⁶ TNS, Inc., 329 NLRB No. 61, at 6, 7.

¹²⁷ *Id.* at 7.

¹²⁸ See NLRB v. Maryland Shipbuilding and Drydock, 683 F.2d 109, 112 (4th Cir. 1982).

¹²⁹ OHIO REV. CODE ANN. § 4167.06 (2001-2002).

¹³⁰ MINN. STAT. ANN. § 182.654 (2001).

¹³¹ See e.g. MD. CODE ANN. LAB. & EMPL. § 5-407 (2001), and N.J. STAT. ANN. § 34:5a-16 (2002).

The laws of the District of Columbia, which could conceivably have aided Mr. Morris because he worked for USPS at Brentwood, which is located in Washington, D.C., require employers to “furnish a place of employment which shall be reasonably safe for employees....”¹³² District of Columbia law also protects an employee against discrimination because the employee refused to perform work that the employee believes creates a dangerous situation that could cause harm to the physical health or threatens the safety of the employee or another employee, for which the employee is inadequately trained, or under conditions which are in violation of the health and safety rules of the District or federal health and safety or environmental laws.¹³³

B. The Right to Refuse Hazardous Work Under 29 C.F.R. § 1977.12 (b)(2).

The OSH Act was designed to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources....”¹³⁴ To achieve that purpose, the OSH Act requires employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹³⁵ However, the OSH Act does not generally provide an employee with the right to “walk off the job because of potential unsafe conditions at the workplace.”¹³⁶

An additional source of the right to refuse hazardous work, and the one most applicable to Mr. Morris in October 2001, is found in 29 C.F.R. 1977.12, which provides

¹³² D.C. ST. 1981 § 32-808 (2001).

¹³³ D.C. ST. 1981 § 32-1117 (2001).

¹³⁴ 29 U.S.C.A. § 651(b).

¹³⁵ 29 U.S.C.A. § 654(a)(1).

¹³⁶ 29 C.F.R. 1977.12(b)(1); *Tamara Foods*, 692 F.2d at 1181.

an employee a limited right to refuse hazardous work under certain urgent circumstances.¹³⁷ Section (b)(2) of this rule provides in part,

However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.¹³⁸

Certain other conditions must be met for an employee to be protected under this rule. First, the “condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury.”¹³⁹ The employee must also take such action, under the same reasonable person standard, because of his belief “that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.”¹⁴⁰ Finally, the rule requires that the employee “where possible, must have also sought from his employer, and been unable to obtain, a correction of the dangerous condition.”¹⁴¹

In *Whirlpool v. Marshall*, the Supreme Court upheld 29 C.F.R. § 1977.12 (b)(2) as a valid exercise of the Secretary of Labor’s rulemaking authority under the OSH Act.¹⁴² In that case, two maintenance employees refused their supervisor’s order to climb out onto a wire mesh fence that was hung, horizontally, over the plant production floor to prevent objects from falling onto the workers below.¹⁴³ The employees refused to do this after telling various supervisors about their concerns with climbing onto the wire screen

¹³⁷ 29 C.F.R. 1977.12(b)(1), (2); *Tamara Foods*, 692 F.2d at 1181.

¹³⁸ 29 C.F.R. 1977.12(b)(2).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 22 (1980) (construing the extent of the Secretary of Labor’s rulemaking authority under 29 U.S.C.A. § 657 (g)(2)).

¹⁴³ *Whirlpool Corp.*, 445 U.S. at 6-7.

and after they asked one of their supervisors for the name, telephone number, and address of a safety representative from the local OSHA office.¹⁴⁴ Their concerns were largely prompted by the recent death of a fellow employee who fell through the fence after climbing onto it, and by prior instances in which employees had partially or completely fallen through the wire screen.¹⁴⁵ When the employees refused to follow the order to work on the screen by stepping onto it, in violation of the employer's own recently established policy to the contrary, they were ordered to clock out for the remaining hours of their shift and were not paid for that time.¹⁴⁶

Shortly thereafter, the Secretary of Labor sued the employer in federal district court for wrongfully discriminating against the two employees in violation of the OSH Act.¹⁴⁷ The focus of the case was on the validity of 29 C.F.R. 1977.12 (b)(2). The lower court, despite finding that the employees were justified in refusing to perform the ordered work based on the text of the regulation, denied relief because it held the regulation to be invalid because it was not consistent with the OSH Act. The Sixth Circuit Court of Appeals disagreed and reversed the district court's decision.¹⁴⁸ The Supreme Court upheld the Sixth Circuit Court's decision and held that the regulation was a valid exercise of the Secretary of Labor's statutory rulemaking powers under the OSH Act.¹⁴⁹

The Supreme Court upheld the regulation on two primary bases. First, it held that the regulation was clearly consistent with the "fundamental objective of the Act – to

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.* at 5-6. After the employee died, the employer established a policy that maintenance personnel were not to climb onto the fence itself, but were to follow an alternative procedure in replacing and repairing the wire screen. The employer was also cited by OSHA for the incident in which the employee died. *Id.*

¹⁴⁶ *Id.* at 7.

¹⁴⁷ *Id.* (alleging that the employer violated the non-discrimination provisions of 29 U.S.C.A. § 660(c)(1)).

¹⁴⁸ Whirlpool Corp., 445 U.S. at 8.

¹⁴⁹ *Id.* at 8, 22.

prevent occupational deaths and serious injuries.”¹⁵⁰ The Court carefully reviewed the legislative history of the OSH Act, and noted that the history contained “numerous references to the Act’s preventive purpose and to the tragedy of each individual death or accident.”¹⁵¹ The Court further stated,

The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent death or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.¹⁵²

The Court also concluded that the regulation could be seen as a proper tool to help fulfill the protections afforded employees by § 654(a) (1) of the OSH Act.¹⁵³ The Court construed from the OSH Act’s legislative history that Congress intended the generally duty clause to “deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary.”¹⁵⁴ The Court further noted that safety laws are to be “liberally construed to effectuate the congressional purpose,” and also stated, “Since OSHA inspectors cannot be present around the clock in every

¹⁵⁰ *Id.* at 11.

¹⁵¹ *Id.* at 12, n. 16. The Court cited to the statement of Senator Yarborough, a sponsor of the Senate OSH bill, “We are talking about people’s lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day’s work with their bodies intact.” *Id.* (Citations omitted.) See also *Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156, 1164 (3rd Cir. 1992) (commenting, “Indeed, the purpose of OSHA is preventive rather than compensatory”), and *Mineral Industries v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981) (stating, “The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors”).

¹⁵² *Whirlpool Corp.*, 445 U.S. at 12.

¹⁵³ *Id.* (this provision is commonly referred to as the “general duty clause”).

¹⁵⁴ *Id.* at 13.

workplace, the Secretary's regulation ensures that employees will in all circumstances enjoy the rights afforded them by the 'general duty' clause."¹⁵⁵

In *Marhsall v. N.L. Industries, Inc.*, the Seventh Circuit Court of Appeals reversed a federal district court's ruling that the Secretary of Labor could not sue an employer for discrimination against an employee who refused allegedly hazardous work, where the employee had already won a favorable decision at an arbitration proceeding pursuant to the governing collective bargaining agreement.¹⁵⁶ The Seventh Circuit Court of Appeals relied on the Supreme Court's decision in *Whirlpool v. Marshall* in reversing the lower court's decision.¹⁵⁷ The Court of Appeals held that for an employer to be liable for a violation of § 1977.12 (b)(2), the Secretary of Labor must prove that an employee who refused work "had a reasonable and good faith belief that the conditions leading to his refusal...were dangerous" and that the employer fired the employee, or took other adverse action against him, because of the employee's refusal.¹⁵⁸

According to public guidance issued by OSHA, an employee who refuses to perform an assigned task will be protected under this rule, if all of the following conditions are met,

Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so; and [y]ou refused to work in 'good faith.' This means that you must genuinely believe that an imminent danger exists. Your refusal cannot be a disguised attempt to harass your employer or disrupt business; and [a] reasonably person would agree that there is a real danger of death or serious injury; and [t]here isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.¹⁵⁹

¹⁵⁵ *Id.*

¹⁵⁶ *Marshall v. N.L. Industries, Inc.*, 618 F.2d 1220, 1225 (7th Cir. 1980).

¹⁵⁷ *N.L. Industries*, 618 F.2d at 1221; *see Whirlpool Corp.*, 445 U.S. 1.

¹⁵⁸ *N.L. Industries*, 618 F.2d at 1224.

¹⁵⁹ OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, "Refusing to Work Because Conditions are Dangerous," at www.osha.gov/as/opa.worker/refuse.html.

The guidance adds that where all of these conditions are met, an employee should ask the employer to correct the hazard and to allow him to do other work. The employee should also tell the employer that he won't do the work unless the hazard is corrected, and the employee should stay at the work place until told to leave by the employer.¹⁶⁰ The guidance concludes by advising an employee to contact OSHA immediately if his employer discriminates against him for refusing to perform "dangerous work."¹⁶¹

Factors that courts have strongly considered when applying the reasonable person aspect of this rule include whether or not there have been prior accidents as a result of the hazardous condition or prior instances where equipment has malfunctioned, whether the employee in question was aware of such cases at the time he chose not to perform the assigned task, the severity of the conditions at the time in question, and whether or not the employee complained to a supervisor about the dangers of the situation at time in question.¹⁶² Employers have countered with the argument that a particular employee did not act reasonably because others continued to do the same work after the employee refused to do so, but courts have generally not found this type of evidence to be persuasive regarding the reasonableness of an employee's refusal to perform hazardous work, in part because the continued work by different employees under the same circumstances may have been unreasonable itself.¹⁶³ A singular exception is found in the case of *Marshall v. National Industrial Constructors, Inc.*, in which the federal district

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *Dole v. H.M.S. Direct Mail Service, Inc.*, 752 F. Supp. 573, 578 (W.D.N.Y. 1990); *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1428 (10th Cir. 1984); *Stepp v. Review Board of the Indiana Employment Security Division*, 521 N.E.2d 350, 354 (Court of Appeals of Indiana, 4th Cir. 1988); *Firestone Tire and Rubber Co.*, 1980 WL 29272 (C.D.Ill.).

¹⁶³ Compare *Firestone Tire and Rubber Co.*, 1980 WL 29272 (C.D.Ill. 1980), and *In re Hahner, Foreman & Harness, Inc.*, 1982 WL 119252 (D.Kan.), affirmed 736 F.2d 1421 (10th Cir. 1984), with *National Industrial Constructors, Inc.*, 1980 WL 29273 (D.Neb. Jan. 25, 1980), and *Dole*, 752 F. Supp. at 578.

court relied in part on evidence that work which three employees had refused to do was subsequently performed without incident by different employees.¹⁶⁴ The importance of that evidence to the court in *National Industrial Constructors, Inc.*, however, was clearly outweighed by the greater evidence that the employees actually refused to do the assigned work because they wanted more money, and not because of their purportedly good faith belief that the work was dangerous.¹⁶⁵ The fact that employers have not generally succeeded with this type of post-hoc argument verifies the precise manner in which the rule has been applied, based upon its language that requires the application of a test which objectively compares the actions of the employee against those of a “reasonable person, under the circumstances then confronting the employee....”¹⁶⁶

While the Supreme Court in *Whirlpool v. Marshall* stated that the OSH Act “does not wait for an employee to die or become injured” in order for an employee to be protected by its provisions, some courts have been more skeptical of an employee’s claimed good faith belief about a hazardous condition where evidence of prior accidents was not presented or was not known to the employee at the time he refused to work.¹⁶⁷ Courts have also refused to uphold an employee’s refusal to perform assigned work, however, where there is evidence that the employee was not motivated by safety concerns, but rather by some other motive – like trying to obtain more money by refusing to perform an assigned task.¹⁶⁸ The employer’s attitude and responsiveness in the face of an

¹⁶⁴ *National Industrial Constructors*, 1980 WL 29273, at 11.

¹⁶⁵ *Id.*

¹⁶⁶ 29 C.F.R. § 1977.12 (b)(2).

¹⁶⁷ *Whirlpool Corp.*, 445 U.S. at 12; *see Stepp*, 521 N.E.2d at 354, *and National Industrial Constructors*, 1980 WL 29273.

¹⁶⁸ *See National Industrial Constructors*, 1980 WL 29273 (in dictum, commenting that a work refusal was motivated by money and not by hazardous conditions), *and Stepp*, 521 N.E.2d at 354 (in dictum, stating that it was reasonable to conclude that lab employee’s refusal to handle AIDS labeled vials was based on religious beliefs and not safety concerns).

employee's safety-related complaints or refusal to perform an allegedly hazardous task have also carried great weight in past cases.

The protections afforded an employee under § 1977.12 (b)(2) are more similar in scope to those provided under § 502 of the LMRA, because an objective analysis is required to evaluate the employee's work refusal, versus a merely subjective, good faith analysis under § 7 of the NLRA regarding protected, concerted activity.¹⁶⁹ Even in the case of an employee's invocation of a protection from a collective bargaining agreement under § 7, the reasonableness inquiry will focus on the facts in relation to the terms of the bargaining agreement, and will not require a court to apply an objective, reasonable person analysis to the employee's decision based on the conditions the employee was faced with at the time.¹⁷⁰ The regulation will potentially protect a greater number of employees than will § 7 because the requirement of concerted activity does not apply and because it covers employees as defined by the OSH Act, the number of which exceeds that of employees covered under the National Labor Relations Act.¹⁷¹ However, in reality, the protections of the regulation may be more limited because of the application of a reasonable person test which does not apply in a § 7 analysis.¹⁷²

To be protected under 29 C.F.R. § 1977 (b)(2) when refusing to perform hazardous work, an employee must have a subjective, good faith belief regarding the dangerousness of the situation and regarding the lack of other options besides refusing the assigned work.¹⁷³ Additionally, the employee's refusal must be objectively

¹⁶⁹ See Larry C. Backer, Note, *Refusals of Hazardous Work Assignments: A Proposal for a Uniform Standard*, 81 COLUM. L. REV. 544, 560-64 (1981).

¹⁷⁰ See City Disposal Systems, 465 U.S. at 837, 840.

¹⁷¹ See Backer, *supra* note 169, at 560-564.

¹⁷² See *Id.* at 564.

¹⁷³ 29 C.F.R. § 1977.12 (b)(2).

reasonable, based on a reasonable person standard.¹⁷⁴ This standard may not be difficult to meet in cases dealing with hazards that are fairly common in the workplace or that can be easily detected through observation, such as cases of malfunctioning equipment or of hazardous conditions caused by adverse weather conditions on a particular occasion.¹⁷⁵ But, it is also a standard that at best will be difficult to apply, and at worst, impossible to apply fairly when dealing with terrorist acts or threats in the workplace, as the case of Mr. Morris illustrates.

C. What Would a Reasonable Person at Brentwood Have Done?

Mr. Morris could not have refused to work under hazardous conditions, as a form of concerted, protected activity, under either § 7 of the NLRA or § 502 of the LMRA. As a member of the APWU, Mr. Morris was subject to the terms of a collective bargaining agreement which provided that the APWU and its members would not “call or sanction a strike or slowdown.”¹⁷⁶ While the collective bargaining agreement required USPS’ management officials “to provide safe working conditions in all present and future installations and to develop a safe working force,” it did not authorize employees or their union to refuse work because of hazardous or unsafe working conditions.¹⁷⁷

More importantly, Mr. Morris was barred from striking by federal law under the same terms as other federal employees.¹⁷⁸ If he engaged in a strike he was subject to

¹⁷⁴ *Id.*

¹⁷⁵ See generally Backer, *supra* note 169, at 576-77.

¹⁷⁶ Collective bargaining agreement, USPS and APWU, 1998 – 2000, available at <http://www.apwu.org>.

¹⁷⁷ *Id.*

¹⁷⁸ See Postal Reorganization Act of 1970, P.L. 91-375 (codified at 39 U.S.C.A. § 410). “Labor-management relations would, in general, be subject to the National Labor Relations Act, as amended, and its provisions would be enforceable by the National Labor Relations Board and the Federal Courts. Unfair labor practice charges would be handled just as they are in the private sector.” “[T]he postal service is too important to the people and the economy of this nation for us to tolerate postal strikes. Under H.R. 17070, the existing ban on strikes by federal employees would be continued without change.” *Id.* (citing Postal

criminal penalties, including a fine and possible imprisonment of up to one year.¹⁷⁹ The prohibition against participation in a strike by federal employees includes postal employees, and it has survived constitutionally based challenge.¹⁸⁰ This barrier also precluded him from the protections of § 502 of the LMRA, which excludes from the word “strike” an employee’s refusal to work when faced with “abnormally dangerous conditions.”¹⁸¹ While postal employees are subject to the provisions of the NLRA (subchapter II of chapter 7, title 29, 29 U.S.C.A. §§ 151-169), they are not protected by the provisions of the LMRA (subchapter I of chapter 7, title 29, 29 U.S.C.A. §§ 141 – 144).¹⁸²

In 1988, the Postal Employees Safety Enhancement Act made the OHA Act applicable to the USPS “in the same manner as any other employer.”¹⁸³ This statute achieves that goal by including the postal service within the definition of the term “employer” under the OSH Act, while excluding the “United States or any State or political subdivision of a State” as a covered employer.¹⁸⁴ As a result, Mr. Morris was an

Reorganization Act House Report No. 91-1104, May 19, 1970, 2 U.S. Code Cong. and Admin. News 1970, p. 3662).

¹⁷⁹ See 39 U.S.C.A. § 410 (b)(2) (incorporating the provisions of title 18 regarding employees of the United States government); *see also* 18 U.S.C.A. § 1918(3), *and* 5 U.S.C.A. § 7311(3).

¹⁸⁰ See *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *aff’d mem.*, 404 U.S. 802 (1971), *and* *United States v. Taylor*, 693 F.2d 919, 921-922 (9th Cir. 1982).

¹⁸¹ 29 U.S.C.A. § 143.

¹⁸² See 39 U.S.C.A. § 1209 (a); *see also* *Manriquez v. U.S. Postal Service*, M.S.P.B. 1985, 29 M.S.P.R. 540, 542 (stating that “The federal labor laws are not applicable to the Postal Service absent a specific provision in the Postal Reorganization Act (PRA) or other statute.”); *see also* *McCandless v. U.S. Postal Service*, 62 M.S.P.R. 383 (1994) (commenting, “Under the Postal Reorganization Act of 1970, Pub.L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. § 101 et seq.)(PRA), the Postal Service is the only Federal entity subject to the jurisdiction of the National Labor Relations Board (NLRB). 39 U.S.C. § 1202.”)

¹⁸³ Postal Employees Safety Enhancement Act of 1998, Pub. L. No. 105-241 (codified at 5 U.S.C.A. § 7902, 29 U.S.C.A. § 652 (5), and § 668 (a)).

¹⁸⁴ *Id.* Other employees of the United States are covered by the provisions of 29 U.S.C.A. § 668, regarding safety programs for federal agencies, and are beyond the scope of this paper. Employees of federal agencies also have a right to decline to perform an assigned task “because of a reasonable belief that, under the circumstances the task poses an imminent risk of death or serious bodily harm coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures....” 29 C.F.R. § 1960.46; *see also* Brian Friel, *Facing anthrax threat, employees*

employee under the OSH Act and was covered by the provisions of 29 C.F.R. § 1977.12 (b)(2).¹⁸⁵

Aside from any potential relief that Mr. Morris might have gained pursuant to the laws of the District of Columbia, 29 C.F.R. § 1977.12 (b)(2) was the only potentially meaningful source of protection for Mr. Morris to rely upon if he had chosen to walk off the job or otherwise refused to work, without the fear of losing his job or otherwise being disciplined, during the anthrax crisis of 2001. To that end, the critical question is what would a reasonable person have done when faced with the same circumstances as Mr. Morris at the time it was happening?

Mr. Morris suspected that he had been infected with anthrax, as evidenced in his 911 call, and clearly, must have been aware of the growing anthrax crisis prior to Friday, October 12, the first day that he could have been exposed to the apparently undetectable spores at Brentwood.¹⁸⁶ Postal officials were aggressively trying to communicate with postal employees through numerous press releases and mandatory bulletins to be briefed to postal employees through various means, throughout the month of October. Would Mr. Morris' job have been protected if he had refused to come to work, prior to October 12, based on the provisions of 29 C.F.R. § 1977.12 (b)(2)?

Assuming that a reasonable person received the numerous bulletins and other information provided by USPS' officials (in addition to information available from numerous media sources) during the earliest stages of the anthrax crisis, he would have known that postal investigators were helping with the investigation of the Florida cases,

have limited right not to work, GOVEXEC.COM, October 30, 2001, Daily Briefing, at <http://www.govexec.com/dailyfed/1001/102901b1.htm>.

¹⁸⁵ See Postal Employees Safety Enhancement Act of 1998, Pub. L. No. 105-241 (codified at 29 U.S.C.A. § 652 (6) and § 668 (a)).

¹⁸⁶ ASSOCIATED PRESS, *supra* note 1.

that anthrax had been found in *The Sun*'s offices, where one worker had died of inhalational anthrax and another, who handled mail, was sick with inhalational anthrax.¹⁸⁷ He also would have known that his employer was sending out a barrage of messages relating to anthrax and the mail, which described in part various procedures to follow in order to be safe, and also repeatedly assured postal employees that there was no known link between anthrax and the mail.¹⁸⁸ In light of this information, it is clear that a reasonable person could not have justifiably refused to go to work at Brentwood on Friday, October 12, even if he had a subjective, good faith belief that going to work would be likely to cause him death or serious bodily injury because of potential anthrax exposure. By all accounts, Mr. Morris took the approach of a reasonable person, and was exposed to anthrax at some point between October 12 and October 16.¹⁸⁹

In his 911 call, Mr. Morris said that on Saturday, October 13, he was in the vicinity of an envelope with powder in it which a coworker handled, and that this incident was reported to a supervisor, although he was never told, at least perhaps officially, whether or not it was positive for anthrax.¹⁹⁰ Could he have justifiably refused to stay at Brentwood after he was exposed to this envelope? Using the reasonable person standard of § 1977.12 (b)(2), the answer is unclear. While postal officials apparently gave the envelope in question to FBI officials for testing, it does not appear that they complied with their own anthrax policy that was in effect at the time because there is no indication that they isolated and evacuated the area until law enforcement officials arrived, or that they even notified any other emergency response officials, which their own policy

¹⁸⁷ See Ballard, *supra* note 32.

¹⁸⁸ See USPSNEWSTALK, SPECIAL EDITION, *supra* note 47, and USPSNEWSBREAK A.M., *supra* note 47.

¹⁸⁹ See generally CENT. FOR DIS. CONTROL, *supra* note 70, at 1129-1133, and J.A. JERNIGAN ET AL., *supra* note 13, at 933, 937.

¹⁹⁰ ASSOCIATED PRESS, *supra* note 1.

required.¹⁹¹ They did not perform any environmental testing at Brentwood until Thursday, October 18, and by all accounts the environmental testing was primarily done in response to the events on Capitol Hill, as opposed to the reported envelope with powder from Saturday the 13th.¹⁹² Postal officials also did not have Mr. Morris or his coworkers who handled or were near this envelope tested for anthrax infection or given antibiotics as a prophylactic measure.¹⁹³ Their inaction was presumably due to the failed advice of officials from the CDC, whose approach throughout the ordeal seemed to be, at least in part, to wait to react until sufficient evidence arose – in the form of a sick employee.¹⁹⁴

The presence of an envelope with powder in it, amidst all that was occurring at the time, provides a stronger basis for a reasonable person to have concluded that it was no longer safe to come to work, or to stay at work during that shift, at Brentwood, on the 13th. At the same time, the message from USPS' officials that all was okay had been repeatedly heralded against a backdrop that no one at Brentwood was then known to be sick; this would have been formidable evidence for a reasonable person to have ignored under the circumstances.¹⁹⁵ At best, a reasonable person, and accordingly Mr. Morris would have been presented with a nearly impossible choice, and at worst, he would have been fired or disciplined if he had chosen to walk off the job and was not later vindicated.

¹⁹¹ See Rosenbaum, *supra* note 94 (reporting that the suspect letter was set aside and given to the FBI); see also UNITED STATES POSTAL SERVICE MANAGEMENT INSTRUCTION, *supra* note 17 (stating that it is management's responsibility to minimize potential exposures through quick isolation and evacuation until emergency response and law enforcement can arrive and take control of the incident.").

¹⁹² See *House Oversight Hearings*, Potter statement, *supra* note 6.

¹⁹³ *Id.*

¹⁹⁴ See Terhune, *supra* note 25 (quoting Dr. Perkins of the CDC); see also *House Oversight Hearings*, *supra* note 6.

¹⁹⁵ See USPSNEWSTALK, *supra* note 47, and USPSNEWSBREAK A.M., *supra* note 47.

Would the picture have changed on Monday, October 15, when the letter to Senator Daschle was discovered and first publicized? Probably so, at least for Mr. Morris and any other who knew of the envelope with powder in it from Saturday, October 13. While that letter turned out to be negative for anthrax, USPS' officials did not publicly announce that fact until November 7, the day that the text of Mr. Morris' 911 call was being publicized for the first time.¹⁹⁶ In that press release, postal officials said that employees at Brentwood were told of the negative test results, but they did not say when they were told nor did they say that Mr. Morris was ever told.¹⁹⁷ Not until the next day, November 8, did postal officials assert that Mr. Morris was told of the negative test results prior to his death.¹⁹⁸ Mr. Morris' statements in his 911 call seem to refute that assertion, and reflect his frustration at not being able to get enough information and not trusting those who gave it to him.¹⁹⁹ Regardless, once Mr. Morris knew, presumably on Monday evening, October 15, or Tuesday, October 16, that the letter to Senator Daschle had come through Brentwood, he would have possessed a stronger basis to refuse to go to work at Brentwood, under § 1977.12 (b)(2), because a reasonable person in his shoes likely would have done the same thing. At the same time, the issue is close because throughout that week, USPS' officials continued to send reassuring messages, based on the advice of the CDC, that Brentwood employees were not at risk, which culminated in a press conference at Brentwood on Thursday, October, 18, the day that USPS' officials finally began environmental testing.²⁰⁰ The choice of whether or not to go into work at

¹⁹⁶ See UNITED STATES POSTAL SERVICE NEWS, *supra* note 90.

¹⁹⁷ *Id.*

¹⁹⁸ See USPSNEWSBREAK A.M., *supra* note 91.

¹⁹⁹ See ASSOCIATED PRESS, *supra* note 1.

²⁰⁰ See House Oversight Hearings, *Potter Statement*, *supra* note 6.

Brentwood would have been extremely difficult for a reasonable person to make under those circumstances.

The same would have been true for Mr. Morris. There is no information in the public domain that indicates that Mr. Morris missed any scheduled work shifts during the week of October 15 because he refused to go to work out of fear for his health.²⁰¹ Further, if he had refused to go to work, perhaps on Tuesday or Wednesday of that week, it may not have made a significant difference, for several reasons: he almost certainly had already been infected by that time; his healthcare provider apparently misdiagnosed him on Thursday, the 18th; because no testing began at Brentwood until Thursday of that week; and no antibiotics were given as a precaution until after Mr. Morris died on the following Sunday.²⁰² Then again, if he had taken a stand and refused to go to work because of the fears that he certainly experienced, perhaps he would have drawn attention to himself and his suspicions and perhaps he would have gotten a response from USPS' officials despite the mistaken advice they were getting from the CDC at the time.²⁰³

Mr. Morris was not able to enjoy any measurable protections under 29 C.F.R. § 1977.12 (b)(2), at the time when his rights under the rule were most needed. If he had walked off the job, or at least refused to continue working in Brentwood in order to protect himself before the time that he was almost certainly exposed, the 12th or 13th of October, he would have failed the reasonable person test contained in the rule and placed

²⁰¹ The author asked on several occasions for information about this issue and other issues of Mr. Jimmy Bell, Esquire, attorney for Mr. Morris' estate in the pending wrongful death suit against his healthcare provider, but Mr. Bell never responded to the requests (email requests on file with the author).

²⁰² See J.A. JERNIGAN, *supra* note 13, at 933, 937; *see also* ASSOCIATED PRESS, *supra* note 1, Estate of Thomas L. Morris, Jr., *supra* note 84, and *House Oversight Hearings, Potter statement, supra* note 6.

²⁰³ See UNITED STATES POSTAL SERVICE FACT SHEET, *Mid-day Update* (October 25, 2001), 2, <http://www.apwu.org/departments/ir/s&h/anthrax/USPS%20Fact%20Sheets/USPS%20Fact%20Sheet%20Oct.%202001%20Mid-Day.PDF> (stating, "Employees who did not report to work as scheduled [at Brentwood] are being contacted to ensure they are in good health.") *Id.*

his job in jeopardy. He would have had a stronger basis to walk off the job after seeing an envelope with powder in it on Saturday, October 13, but whether he could have refused work is a very close issue and would have certainly presented an impossible choice for him to make, particularly if a supervisor told him at the time or soon thereafter that he must come back to work or be subject to disciplinary action. Once he knew that the letter to Senator Daschle had come through Brentwood, when coupled with his encounter with the envelope with powder from Saturday, October 13, he probably could have justifiably refused to report to work, at least at Brentwood or in the part of Brentwood that he thought might be contaminated with anthrax. At the same time, the decision would have been extremely difficult for him to make under the circumstances because his employer was assuring postal employees throughout the week of October 15 that there was no known risk to Brentwood employees based on the advice of CDC officials.

The protections of § 1977.12 (b)(2) were hollow and failed Mr. Morris in this case. Any protections from the rule would have flown to him only when it was too late to provide him with any meaningful chance of avoiding infection from anthrax, which is the purpose behind the rule. The language of the rule and the cases wherein employees were held to be justified in relying in refusing hazardous work indicate that it was designed to protect employees against hazards or dangers that are identifiable, based upon the requirement to test an employee's refusal against a reasonable person standard "under the circumstances then facing the employee."²⁰⁴ An employee's generalized suspicion or hunch was not meant to be protected by the rule, which is understandable when dealing

²⁰⁴ 29 C.F.R. § 1977.12 (b)(2).

with workplace hazards that are common to the workplace or at least easily identifiable, such as faulty machinery, bad weather conditions, inadequate equipment, etc.²⁰⁵

The current rule, however, is clearly inadequate to protect employees, in any meaningful, preventive way, against many hazards that will come as a result of terrorist activity in the workplace. As the anthrax case illustrates, many such hazards, at least those associated with the use of biological or chemical agents as a weapon of terror, may be invisible and odorless and largely impossible to detect until it is too late. The anthrax crisis, if nothing else was a case in which the sophistication level of the threat at hand – the threat of anthrax spores infecting mail handlers during mail processing, outpaced the scientific knowledge of our best experts who were working on the case. Mr. Morris needed more protections than § 1977.12 (b)(2) offered in this case, in light of the failures of his employer and CDC officials to protect him, and America's workers need greater protections as well to better equip them to face the harm, and the fear, that future terrorist acts will certainly bring.

IV. A Proposal to Better Protect Employees

The tragic death of Mr. Morris from anthrax inhalation illustrates the vulnerability of America's workers to terrorist activity at work. The numerous warnings by government officials since that crisis regarding the threat of future terrorist activity in America also make clear that America's workers will be targets or at least have to face the indirect consequences of such acts in the future.²⁰⁶

The inability of Mr. Morris' employer to protect him against a weapon of bioterrorism at work is stunning in light of the fact USPS' officials were working so

²⁰⁵ See generally, TNS, Inc., 329 NLRB No. 61, at 6, 7.

²⁰⁶ See generally, The Department of Homeland Security, <http://www.whitehouse.gov/homeland/>.

closely with officials from the CDC and other experts at the time. Few employers would have more resources or access to better advice than the USPS had during the anthrax crisis of 2001, but unfortunately, its resources and the CDC's advice were not enough to prevent Mr. Morris' death. The CDC was wrong in its assumptions until it was too late regarding the threat that the letter to Senator Daschle posed to postal employees at Brentwood, and the fact that the powder laced letter of October 13, 2001, did not raise more suspicions before Mr. Morris died is troubling indeed. Despite the potential to spread blame, it is clear that this was largely a case in which the science behind the threat at issue outpaced the scientific and medical knowledge available to prevent it. Similar situations will almost certainly occur in the future in relation to other types of terrorist acts, and to conclude that we have seen it all in terms of the potential means by which terrorist activity will be perpetrated on American soil and in America's workplaces would be foolish indeed.

Consequently, steps should be taken to better protect America's workers against the threat of terrorist activity in the workplace. One such change is to allow workers the opportunity to better protect themselves, under reasonably limited circumstances, by increasing their right to refuse hazardous work in the face of the threat of a terrorist attack in the workplace. To that end, the Secretary of Labor should promulgate a regulation to supplement the terms of 29 C.F.R. § 1977.12 (b)(2). The proposed regulation should provide as follows,

No employee shall be discriminated against for refusing to perform an assigned task or for refusing to expose himself to a hazardous condition or situation resulting from a terrorist act or the threat thereof, under the following conditions:

(1) where the employee honestly believes, under the circumstances, that the task, condition, or situation will result in death or serious injury, and (2) where the employee honestly believes that the danger cannot be adequately alleviated by resort to regular statutory enforcement channels under the OSH Act, or through adherence to his or her employer's emergency action plan or emergency response procedures, so long as the employee's honest belief regarding each issue is supported by some ascertainable, objective evidence that was known to the employee at the time.

While this regulation would not serve as the ultimate solution to protect America's workers against terrorist activity, it would be an important tool to better protect them in certain situations where they otherwise may not be protected.

The proposed regulation would reasonably enhance the right of employees to refuse hazardous work without having to be judged against the reasonable person standard of § 1977.12 (b)(2), which will not adequately protect employees when faced with life or death choices that terrorist activity will present while on the job. The reasonable person standard of the current regulation will be ineffective in such cases, particularly those featuring threats in which the sophistication level of the threat exceeds the bounds of science known at the time, because the employee will not be able to know with any modicum of assurance what a reasonable person would do under the same circumstances.

The reasonable person standard will also fall short during subsequent litigation, if the rule is applied as it is written, without the benefit of hindsight which would prove so crucial in evaluating Mr. Morris' rights to refuse hazardous work. Looking back, many people would agree that Mr. Morris should have stayed away from Brentwood beginning October 13, when he saw an envelope with powder in it, if not the day before during the midst of the growing anthrax crisis. However, in deciding what a reasonable person

would have done at the time and under the same circumstances that he was facing, it is clear that the standard offered no meaningful protections to him when it was crucial because the advice his employer was giving him was wrong, based on the failed advice of the CDC. It is reasonable to anticipate that other employees will find themselves in similar predicaments in the future when faced with terrorist activity or the threats thereof at work. To rely on the hope that reviewing authorities would deviate from the language of the rule and apply it in a lenient fashion in the future when reviewing cases is not reasonable and provides no benefit to employees who will need to look to its provisions when making these vital choices.

In *Refusals of Hazardous Work Assignments: A Proposal for a Uniform Standard*, the author reviewed the different sources of the rights to refuse hazardous work under the federal labor laws and under 29 C.F.R. § 1977.12 (b)(2), and concluded that a uniform, federal standard should be adopted based on the federal regulation.²⁰⁷ The author argued that the adoption of a uniform standard would eliminate the problem of uncertainty that surrounds the right because its scope varies depending on the source on which it is based.²⁰⁸ He further argued that a uniform, reasonable person standard would promote government efficiency, would reduce the incentive for forum shopping during litigation, and would generally promote the overall Congressional objective of uniformity in relation to federal labor laws.²⁰⁹ While these arguments hold true today regarding the right of an employee to refuse hazardous work, the standard called for by the author is not the appropriate solution for the vexing problem that terrorist activity in the workplace presents.

²⁰⁷ See Backer, *supra* note 169.

²⁰⁸ *Id.* at 568-577.

²⁰⁹ *Id.* at 572-75.

The proposed standard would promote the interests that the author previously identified while also giving employees a more meaningful right on which they could depend if needed to protect themselves without the fear of risking their jobs. As opposed to the extremely broad protections afforded employees engaged in concerted activity under § 7 of the NLRA, the proposed standard would be more limited and thus more balanced in protecting the interests of employers against potential abuses by employees who might choose to walk of the job or refuse a specified task for nearly any conceivable reason.²¹⁰ Furthermore, the proposed standard would avoid the pitfall found in the high standard required to invoke the protections afforded by § 502 of the LMRA, which would prove particularly troubling in a situation like the one that Mr. Morris experienced at Brentwood.²¹¹

Specifically, to justify an employee's refusal to work under § 502, the NLRA General Counsel must show in part, by a preponderance of the evidence, that the employee's belief ("supported by ascertainable, objective evidence") was a good faith belief that the working conditions were abnormally dangerous, and that the perceived danger posed an immediate threat of harm to employee health or safety."²¹² While the NLRB indicated in a footnote of its *TNS, Inc.* decision that it "rejected the position of the amici that Sec. 502 applies only when the General Counsel has proved that working conditions were *in fact* abnormally dangerous....," it is clear from the Board's own test that there must be a preponderance of the evidence that the "perceived danger posed an

²¹⁰ "The subjective standard of section 7 is weighted too heavily on the employee's side, resulting in too much deference to employee action in questionable situations." Backer, *supra* note 169, at 576.

²¹¹ See generally *TNS, Inc.*, 329 NLRB No. 61. "Section 502 weights the interests of the employer too heavily, making it almost impossible for an employee to prevail, resulting in an imbalance in which employees must risk death or injury in situations where the employer could relatively easily correct the condition." Backer, *supra* note 169, at 576.

²¹² *TSN, Inc.*, 329 NLRB No. 61, at 2.

immediate threat of harm to employee health or safety.”²¹³ Despite this apparent contradiction, a reasonable interpretation of the Board’s view on this issue is that an employer will not be able to automatically prevail on a § 502 related issue by merely showing that the conditions were “safe-in-fact,” particularly when based upon after the fact evidence, although the Board indicated it would generally find this type of evidence helpful.²¹⁴ However, the inability of an employer to automatically prevail through this type of defense does not remove the General Counsel’s burden of showing, through ascertainable, objective evidence, that the “perceived danger posed an immediate threat of harm to employee health or safety.”²¹⁵ What is unclear is the weight that the Board would give to “safe-in-fact” evidence that an employer might present in weighing the sufficiency of the General Counsel’s evidence regarding the reality of a danger that met the required, objective threshold.²¹⁶

Finally, the proposed standard would make the right to refuse hazardous work an individual one, as opposed to one that is contingent on the presence of concerted activity. This seems more appropriate because the decision to protect oneself in this type of situation would most properly be a personal one that should not be contingent on decisions or actions of one’s coworkers.²¹⁷ The proposed standard would also provide employers with an incentive to increasingly use emergency action plans to help prepare for terrorist related activity, along with other workplace emergencies, before such events

²¹³ *Id.*, n. 7 (citing Banyard, 505 F.2d 342).

²¹⁴ See TNS, Inc., 329 NLRB No. 61 at 2, *and* Banyard, 505 F.2d 342, 348 (commenting that evidence that the allegedly unsafe truck was driven for 800 miles without incident or repairs after the employee refused to drive it was “irrelevant to whether there was ‘ascertainable, objective evidence’ supporting a justified conclusion that an abnormally dangerous condition for work existed at the time he refused to drive.” *Id.*, n. 38.).

²¹⁵ See TNS, Inc., 329 NLRB No. 61 at 2, *and* Banyard, 505 F.2d 342, 348, n. 38.

²¹⁶ See TNS, Inc., 329 NLRB No. 61, at 7, n. 31.

²¹⁷ See *Id.* at 577.

occur by essentially requiring employees to look to such plans first, before refusing to work. While such plans cannot address every conceivable emergency scenario, limiting an employee's right to refuse hazardous work because of terrorist activity to cases in which the employee honestly believes, based on some objective evidence, that the employer's emergency action plan or procedures will not protect him will cause employers and employees to want to work together in advance to plan for emergency situations with an increased spirit of cooperation. Finally, the potential for abuse by employees should be minimized by the requirement that employees will not be able to refuse hazardous work because of terrorist related activity unless they can point to some objective, ascertainable evidence to support their fears for their safety. In Mr. Morris' case, his encounter with the envelope containing a powdery substance on October 13, 2001, would have been the objective, ascertainable evidence required under the proposed standard to justify his refusal to work at Brentwood thereafter.²¹⁸ While the proposed standard may not have altered Mr. Morris' fate, it may have allowed him to call greater attention to his fears about his safety by more readily providing him the option of refusing to work at Brentwood shortly after he was apparently exposed to anthrax spores.²¹⁹ It should also help protect other employees in the future by giving them an additional option to protect themselves, when all else has apparently failed.

The author of *Refusals of Hazardous Work Assignments: A Proposal for a Uniform Standard* also proposed that § 1977.12 (b)(2)'s provisions become the uniform, federal standard, through the use of memorandums of understanding between the NLRB

²¹⁸ See generally ASSOCIATED PRESS, *supra* note 1.

²¹⁹ See United States Postal Service Fact Sheet, *supra* note 223.

and OSHA.²²⁰ Such a step would not be adequate for the current proposal because it would not sufficiently provide employees with notice regarding their rights in terrorist related situations, but instead would add to the confusion that the current, varied standards most certainly promote.²²¹ The better approach would be for Congress to modify the NLRA, and the LMRA, to make the proposed standard a uniform, federal standard for employees under the OSH Act, and for those subject to the NLRA whether or not they are represented by a bargaining representative.

V. Conclusion

The death of Mr. Thomas Morris, Jr., from inhalational anthrax while at work reaffirmed, after the tragic events of September 11 that America's workers are vulnerable to terrorist activity at the workplace. Despite the vast resources at the disposal of his employer, USPS, and the direct access that postal officials had to the best experts available, he was not adequately protected primarily because the science behind the threat outpaced the knowledge of our best experts at the time. Mr. Morris' preventive rights against the threat of terrorist activity were also deficient because he could not have enjoyed a reasonable right to help himself by walking off the job at Brentwood until it was most likely too late. This problem can be addressed by reasonably increasing the rights of America's employees to refuse hazardous work in the face of terrorist attacks in the workplace. While increasing this right, as proposed in this article, will not prove to absolutely protect workers from the threat of such attacks in the workplace, it will serve as one step along the path towards increasing their protections against future threats from anthrax and other weapons of terrorism. As importantly, it will help to alleviate the fears

²²⁰ Backer, *supra* note 169, at 578.

²²¹ See *Id.* at 569.

caused by such threats – the type of fear that Mr. Morris tragically had to endure in his final moments of life because of his encounter with anthrax spores in the workplace.